United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2108

Docket [redacted]

To be Argued by:
Dante M. Scaccia **No.**

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

—v.—

THOMAS M. FAHEY,

Appellant.

On Appeal From the Judgment of the United States District Court for the Northern District of New York

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BRIEF FOR APPELLANT

(Thomas M. Fahey)

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IN THE

United States Court of Appeals

For the Second Circuit

No. 74-8285

UNITED STATES OF AMERICA,
Appellee

v.

THOMAS M. FAHEY,
Appellant

On Appeal from the Judgement of the United States District Court for the Northern District of New York

BRIEF FOR THE APPELLANT (THOMAS M. FAHEY)

STATEMENT OF THE ISSUES

1. Whether the trial court erred in not dismissing the indictment as a matter of law on the ground that payments to partners, made pursuant to an agreement between partners that such payments are draws, are not taxable income.

2. Whether the trial court committed plain error by failing to include in the charge any mention of the applicable law of taxable income in a partnership.

3. Whether the trial court committed plain error by failing to include in the charge any mention of the law governing the degree to which a taxpayer has the right to rely on the written instructions of an expert accounting firm telling partners what they should pick up as taxable income from a partnership return prepared by the expert.

4. Whether the trial court erred in denying a judgement of acquittal at the close of the evidence on the ground that the evidence on either of the two elements of proof required in a tax evasion case -- taxability of the income, and intent --was not sufficient to support a verdict.

5. Whether the Defendant's right to a fair trial was deprived in this case, by the use of illegal testimony obtained by wrongful abuse of the Grand Jury process after indictment, which requires reversal -- and also requires a rule that a prosecutor must obtain permission of the Court to use the Grand Jury process for any purpose after indictment.

6. Whether the prosecutor, in the management of the case vis-a-vis the defendant, undertook actions that were not properly professional to the extent that he adversely influenced the right of the Defendant to a fair trial.

STATEMENT OF THE CASE

Thomas M. Fahey appeals from a judgement of conviction entered on July 19, 1974, after a three day trial before Hon. Lloyd F. MacMahon and a jury on two counts of income tax evasion charged in indictment No. 73-CR-181. 26 U. S. C. Sec. 7201, Int. Rev. Code of 1954 (Tr 278). Appellant was sentenced to three years imprisonment on each of counts one and two, to run concurrently with each other, and sentenced to pay a fine of $10,000 on each of counts one and two, total $20,000. The defendant is to stand committed until this fine is paid. Execution of the prison sentence is suspended and defendant is placed on probation for a period of three years, subject to the standing probation order of this Court and the special condition that he pay all taxes, penalties and interest, due and owing by him, for the years 1966 and 1967, within thirty days after determination of those amounts by the Internal Revenue Service. Execution of the above sentence is hereby stayed pending final disposition of any and all appeals from this conviction.

The defendant in this case is Thomas M. Fahey of Syracuse, New York. Mr. Fahey was born and raised in Syracuse, received a BS from Le Moyne College in Syracuse (1953), and an MS in Hospital Administration from Columbia University School of Administrative Medicine (1956).

For a period of 8 years after graduation, he worked in planning and administrative capacities at the Upstate Medical Center in Syracuse (5yrs), served as executive officer of a hospital unit with the United States Air Force in France during the Berlin crisis (1yr), and then worked on the development of a new nursing home in Syracuse (2 yrs) for a local builder whose business failed in 1964.

In the fall of 1964, Mr. Fahey conceived the idea of converting into a large nursing home, an existing structure of a hospital that was being abandoned to move into new facilities.

At that time, there was a serious community need for a large nursing home facility in Syracuse that would be operated on a highly professional basis.

Mr. Fahey approached an architect and a builder in Syracuse who analyzed the structure and concluded it was feasible, economically and physically to tear out large portions of the old hospital and redesign the interior for use as an efficient nursing house, which would also meet the various local, state, and federal regulatory requirements.

Mr. Fahey approached the hospital board who said they would be very pleased to sell him the property for such a purpose, provided Mr. Fahey could obtain the necessary financing.

Mr. Fahey approached the Marine Midland bank of Syracuse, who said they would be pleased to manage a participating mortgage that would include several Syracuse banks, provided Mr. Fahey could obtain one or more partners to provide some equity capital for the project (and also obtain the necessary regulatory approvals from local, state, and federal agencies).

Mr. Fahey thereupon made an arrangement with the builder, Mr. Reno Culotti of the Culotti Construction Company, whereby Mr. Culotti would place Mr. Fahey on the payroll of Culotti Construction immediately after Mr. Fahey could form any partnership acceptable to the bank, and thereby Culotti would undertake the risk of paying Mr. Fahey's salary up until the time all approvals were received and construction could begin. In exchange for this risk, Mr. Culotti would receive the construction contract for the conversion project.

The forming of an acceptable partnership thus became the trigger for launching the project. And the arrangement Mr. Fahey made with the builder was for the obvious purpose of minimizing the investment risk of a prospective partner and thereby making the partnership that much more attractive.

Shortly thereafter, in November of 1964, a partnership was formed that was acceptable to the bank. The partnership consisted of 4 individuals, -- Thomas M. Fahey, Theodore G. Metzger, Walker McKinney, and Dr. George Simpson.

The 4 partners drafted and signed their own partnership agreement on N. .ember 23, 1964. (Ex E). (This was the first of a series of 3 written agreements which incorporated changes we will set forth in the historical sequence in which they were made.)

The first agreement established a general partnership. The pertinent conditions of the first agreement were as follows:

First Agreement	Partnership Interest (Profits)	Losses	Depreciation	"Salaries" or "Draws"
Fahey	45.0%	45.0%	45.0%	None
Metzger	5.0%	5.0%	5.0%	None
McKinney	42.5%	42.5%	42.5%	None
Simpson	7.5%	7.5%	7.5%	None

Note: Since the agreement did not make specific allocations of depreciation or losses different from the profit percentages, the same percentages applied. We have listed all the percentages for the sake of clarity, and for comparison with subsequent agreements.

Immediately after the partnership was formed an option was taken on the hospital property, the sale of which was conditioned on getting (1) regulatory approvals, and (2) bank financing.

Mr. Fahey, in accordance with the arrangement he had made with Mr. Culotti, immediately went on the payroll of the Culotti Construction Company in December 1964, and started work on the architectural changes and regulatory approvals required from the various government agencies.

He continued to work on the payroll of the Culotti Company all through the year 1965.

During 1965, there were two new partnership agreements written -- one in January, and one in November.

In January, the original general partnership agreement was re-drafted into a limited partnership agreement by Bill Murray, the attorney for partner McKinney. In this agreement, (Ex F) all the losses were allocated to partners McKinney and Simpson, and Fahey was allocated a $20,000 per year salary. The pertinent conditions were now as follows:

Second Agreement	Partnership Interest (Profits)	Losses	Depreciation	"Salaries" or "Draws"
Fahey	45.0%	None	45.0%	$20,000 "Salary"
Metzger	5.0%	None	5.0%	None
McKinney	42.5%	85%	42.5%	None
Simpson	7.5%	15%	7.5%	None

Note: The "salary" provision appears under Article 7. Profits and Losses (Ex F).

The salary provision giving Mr. Fahey $20,000 per year from the partnership was not put into effect. -- Instead, Mr. Fahey continued to work on the payroll of the Culotti company (throughout the year 1965) in accordance with the original agreement made between himself and Mr. Culotti prior to the formation of the nursing home partnership.

When the limited partnership agreement was submitted to the State regulatory authorities, the partnership was advised that the nursing home could not operate in New York State as a limited partnership because it was against public policy (avoidance of liability by the limited partners). It had to be a general partnership.

Consequently, a third partnership agreement, again drafted by partner McKinney's attorney Bill Murray, was signed in November, 1965, which re-established the general partnership. There was also another significant change -- this time all the depreciation was allocated to McKinney and Simpson. The conditions were now as follows:

Third Agreement	Partnership Interest (Profits)	Losses	Depreciation	"Salaries" or "Draws"
Fahey	45.0%	None	None	$20,000 "Salary"
Metzger	5.0%	None	None	None
McKinney	42.5%	85%	85%	None
Simpson	7.5%	15%	15%	None

Mr. Fahey strongly protested the taking of all the depreciation and all the losses by McKinney and Simpson, but signed the agreement after McKinney threatened to pull out of the project.

Evenafter the third partnership agreement was signed, Mr. Fahey still continued to work on the payroll of the Culotti company until early

in 1966. By that time, Mr. Culotti was finding it difficult to justify a continuation of his risk expenditure with Mr. Fahey, which by this time had amounted to a considerable sum of money. The regulatory approvals were still being worked on but had not yet been approved, and a specific date for approval could not be predicted with certainty.

Consequently, Mr. Culotti asked Mr. Fahey if his equity partner Mr. McKinney could put in some money of his own that Mr. Fahey could draw on from the partnership, until after the construction started, at which time Mr. Culotti would be willing to put Mr. Fahey back on his payroll and charge his work on the site as a direct construction expense, until the nursing home opened, as they had originally agreed.

Mr. Fahey communicated these circumstances to Mr. McKinney in a letter discussing (1) the over-all status of the project, and (2) the then current over-all financial requirements, dated 4/06/66 (Exhibit 28).

Mr. McKinney agreed to contribute funds to the project, and Mr. Fahey thereupon drew checks to himself from the partnership, as administrating partner until the end of the year. -- At the same time he continued to receive a salary from Culotti until September.

He started drawing his checks from the partnership in April of 1966. At that time Mr. Fahey had no staff of employees. He did however employ the services of the accounting firm of Sheldon Kall of Syracuse.

The accounting question of how to treat the checks drawn by Mr. Fahey to himself was resolved by the accounting firm on its own. It was decided to

treat the payments as a salary, and to withhold and contribute both Federal and State taxes.

Mr. Fahey did not question this action of the accounting firm.

Later the same year (1966), after Mr. Fahey had engaged the firm of Ernst & Ernst as accountants for the nursing home on the recommendation of one of the partners (Theodore Metzger), he was advised by the accountants that they were stopping the payment of withholding and partnership taxes on the money he was drawing from the partnership as a partner. The accountants prepared the claim forms and information required to obtain a refund of the FICA taxes (Ex 26; Ex 27). -- They did nothing about obtaining a refund of the Federal withholding taxes because they were not engaged to handle Mr. Fahey's personal returns, nor were they advising him in any way on his personal taxes (Tr 83), (except for the later instructions given to the partners each year for picking up their taxable income from the U.S. Partnership return).

Again, Mr. Fahey accepted the actions of the new accountants without question. He himself had no accounting training (Tr 158), and he therefore had to rely completely on the accountants he hired.

Construction started in September of 1966 at which time additional funds became available, and Mr. Fahey continued to draw checks from the partnership until the end of the year. The total amounts received by Mr. Fahey from both sources in 1966 were as follows:

From Culotti Construction	$10,600	(Tr 33)
From the partnership	14,999	(Tr 136)
Total for 1966	$25,599	

The construction period lasted 8 months, from September 1966 until May 1967. Mr. Fahey went back on the Culotti payroll from January 1967 until May 1967. For the remainder of 1967, he drew checks from the partnership, so that the total amounts he received from both sources for 1967 was as follows:

From Culotti Construction	$ 8,330.00	(Tr 154)
From the partnership	11,666.62	(Tr 137)
Total for 1967	$19,996.62	

The total amount he received from Culotti for the entire 3-year period (1965-1967) was $26,800 (Tr 38). By subtracting what he received in 1966 and 1967, we have what he received from Culotti in 1965.

Total income for 3-year period from Culotti (Dec 1965 thru Dec 1967)		$26,900
From Culotti in '66 - -	$10,600	
From Culotti in '67 --	8,330	18,930
From Culotti in 1965		$ 7,870

The following is a summary, for easy reference, of the amounts received by Mr. Fahey for the first 3 years of the partnership:

	1965	1966	1967
From Culotti	$7,870	10,600	8,330
From the partnership	-0-	14,999	11,667
Total from both	$7,870	25,599	19,997

During the 8 - month construction period (Sept 66 - May 67) while the building was being renovated, the partners again started talking about changing the partnership agreement. The partners were indicating to each other their dissatisfaction with all the basic financial provisions of the partnership agreement -- including the distribution of profits, losses, depreciation, plus the question of "draws" or "salaries" for the partners.

Although they were unable, during this period, to resolve their differences with respect to the profit - loss - depreciation problem (which was later litigated in 1969 -- Tr 169), they did do something concrete and very specific about the question of "draws" or "salaries" to the partners.

Fahey was already drawing payments for his services as Administrator, so McKinney and Simpson also wanted to draw payments for services rendered - McKinney as Financial Director, and Simpson as Medical Director - on the same basis as Fahey, namely, as working partners.

There was a clear consensus that the 3 partners would receive payments for services -- no one opposed it -- but there was considerable

discussion, off and on, throughout the construction period over the obvious questions of:

(1) How much each of the 3 partners would receive,

(2) Whether to make all the payments "draws" against profits, or "salary" expenses to the partnership,

(3) When the payments to McKinney and Simpson would begin.

It was finally agreed, at a meeting of all 4 partners (Fahey, Metzger, McKinney, and Simpson) in the office of McKinney's attorney, Bill Murray, that payments to the three working partners be made in accordance with the following conditions:

(1) With respect to the amounts:

Fahey would receive $20,000
(1,667 monthly) as Administrator

McKinney would receive $12,000
(1,000 monthly) as Financial Director

Simpson would receive $2,400
(200 monthly) as Medical Director

(2) All these payments to the partners were "draws" against future profits.

(3) The payments to McKinney and Simpson would begin shortly after the opening of the nursing home.

This agreement was ultimately reduced to writing in the form of employment contracts between Fahey, McKinney, and Simpson which specified that the payments would be considered "draws" against future profits. (Tr 63-65, 123-124).

This occurred in September, 1967.

The pertinent partnership conditions were now as follows:

After "Draw" Agreement	Partnership Interest (Profits)	Losses	Depreciation	"Draws" against Profits
Fahey	45.0%	None	None	$20,000
Metzger	5.0%	None	None	None
McKinney	42.5%	85%	85%	$12,000
Simpson	7.5%	15%	15%	$ 2,400

There was no further action by the 4 partners to change these partnership conditions which were still in effect at the time Mr. Fahey filed his 1966 and 1967 individual income tax return in April of 1968.

Since the partners had agreed, and were all bound by the agreement that the payments they all received for their services were "draws" and not taxable income, Mr. Fahey, accordingly, did not include his non-taxable "draw" as reportable income on his individual income tax returns.

ARGUMENT

I

THE TRIAL COURT ERRED IN NOT DISMISSING THE INDICTMENT AS A MATTER OF LAW ON THE GROUND THAT PAYMENTS TO PARTNERS--MADE PURSUANT TO AN AGREEMENT BETWEEN PARTNERS THAT SUCH PAYMENTS ARE DRAWS--ARE NOT TAXABLE INCOME.

The Defense strongly contends that there was a single, powerful piece of evidence revealed in this case that made the taxability of the payments received by Mr. Fahey a matter of law.

That single piece of evidence was the agreement made by all 4 partners that payments to partners for services performed were all to be "draws" and not expenses.

Given this uncontested fact, the trial court should have ruled, as a matter of law, that the payments to Fahey were "draws" and not taxable income.

After both Mr. McKinney and Mr. Fahey established the existence of the agreement, the Defendant's expert CPA accountant testified very clearly on these basic consequences of the agreement:

1. When partners agree to establish draws for themselves, those draws are not taxable income.

2. In this particular case, given all the evidence of the trial that preceded his testimony. Mr. Gravante stated unequivocally that given the agreement, Mr. Fahey's payments were draws and non taxable.

3. The accounting firm, Ernst & Ernst, made a clear mistake by putting Mr. Fahey's payments in Column 6, Schedule K of the U. S. Partnership Return (Tr 173). Mr. Gravante said it was wrong to put any of the partners' payments there.

Given all of this uncontested evidence regarding the consequences of the "draw" agreement, and given the fact that not a single Government witness challenged it in any way, and given that Walker McKinney was indeed called as a Government witness, and that he admitted the existence of the agreement not on direct but on cross-examination, -- given all this, the Defendant respectfully submits the Court had no alternative but to dismiss the indictment as a matter of law.

II

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INCLUDE IN THE CHARGE ANY MENTION OF THE APPLICABLE LAW OF TAXABLE INCOME IN A PARTNERSHIP.

Completely apart from the argument that the payments were non taxable as a matter of law, there is the separate and distinct matter of how the Court handled its charge to the jury with respect to their own consideration of whether the payments were taxable income.

What Defendant claims is plain error here is that the Court just gave the question of taxable income to the jury, without saying anything at all about the law regarding taxable income in a partnership.

We say this is plain error because the legal rules that apply to the facts in the case were not there - and they should have been.

"A criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." United States v. O' Connor, 237 F. 2d 466, 474 n. 8 (2d cir. 1956).

III

THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INCLUDE IN THE CHARGE ANY MENTION OF THE LAW GOVERNING THE DEGREE TO WHICH A TAXPAYER HAS THE RIGHT TO RELY ON THE WRITTEN INSTRUCTIONS OF AN EXPERT ACCOUNTING FIRM TELLING PARTNERS WHAT THEY SHOULD PICK UP AS TAXABLE INCOME FROM A PARTNERSHIP RETURN PREPARED BY THE EXPERT.

Throughout the trial and the testimony, there was an impressive amount of time spent by counsel for the defense questioning several witnesses at length about the letters of instructions sent by Ernst & Ernst to the partnership specifying what items the partners should pick up as taxable income from the U.S. Partnership Returns prepared by Ernst & Ernst for the 1965, 1966, and 1967 tax years.

Even the jury did not escape a detailed reading of the instructions in relation to all the entries on the partnership return.

Defense counsel urged very strongly to the jury in his summation that the instructions given to Fahey were not any kind of an oversight for 3 years running, but were a free reflection of the non-taxability of the payments.

Defendants CPA expert testified strongly about both the need to instruct a taxpayer precisely and specifically in matters involving partnership returns, and also regarding the professional responsibility involved in instructing taxpayers in writing. (Tr 175, Tr 181).

The government never challenged their authenticity and they never challenged their plain meaning.

Given all of this attention to the instructions by the defense, we submit the judge clearly committed plain error when he completely ignored them in his charge. It was as if they had never been introduced into evidence.

We submit it was plain error for the court not to instruct the jury as to what the law said about the degree to which Mr. Fahey could rely on those instructions.

We again cite the case of United States v. O'Connor, supra, because we submit the Defendant was clearly entitled to have this theory of defense set forth to the jury.

IV

THE TRIAL COURT ERRED IN DENYING A JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE ON THE GROUND THAT THE EVIDENCE ON EITHER OF THE TWO ELEMENTS OF PROOF REQUIRED IN A TAX EVASION CASE -- TAXABILITY OF THE INCOME, AND INTENT -- WAS NOT SUFFICIENT TO SUPPORT A VERDICT.

The thrust of our claim of error with respect to the evidence, we think, is highly unusual.

We are "satisfied" with the "state of the evidence" to the extent a Defendant can be satisfied with the evidence in a trial that results in an erroneous verdict.

The government, far from providing proof beyong a reasonable doubt, provided barely a scintilla of proof for either of the two elements required in a tax evasion case.

(1) Proof of taxability

(2) Proof of intent

If the testimony of all the Government's witnesses is read carefully, it becomes very clear that they offered no evidence of either taxability or intent.

In the usual tax evasion case, there is an overwhelming amount of proof and evidence against the Defendant. But in this case, we have the reverse. The strength and weight of the evidence is on the side of the Defendant.

In this connection, we respectfully submit it is the defense in this case that established a "prima facie" case of innocence, while the government had no proof of its own and did not even challenge the proof of the Defense.

This was true at the end of the government's case and was even more true at the end of the Defendant's case.

What we are urging is that the court did not properly evaluate the state of the evidence, and this evaluation, together with an improper charge, made a guilty verdict almost inevitable.

We submit that if the court had discerned all the actual proof that existed relating to both taxability and intent, it would have become very clear that the government had no case.

It is difficult to argue the negative. But that is the case here. The only way this argument can ultimately be substantiated is by reading the entire transcript (which is unusually short because it was only a 3-day trial) and the pertinent exhibits.

It will then become clear that the strongest proofs in the case are the Defendants. Accordingly we submit the court erred in denying a judgement of acquittal at the close of the evidence.*

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*In a criminal case the government has the burden of proving beyond a reasonable doubt every element necessary to constitute the crime charged. Davis v. U.S., 160 U.S. 469, 487 (1895). This burden of proof never shifts. Ibid.; 9 Wigmore, Evidence §2489(a). However, a shifting of the burden of going forward with the evidence often results from the presence of a basic fact which given rise to a presumption in favor of the government. Id., §2489(b).

1. Standard for dismissal

Until recently, the Second Circuit took the position that the test of sufficiency of the evidence to submit the case to the jury or to sustain a conviction by a jury is the same as in civil cases, i.e., the "preponderance" test. U.S. v. Castro, 228 F. 2d 807 (2dCir.), cert. denied, §51 U.S. 940 (1956). However, the Circuit now adheres to the majority rule that there must be sufficient proof so that a reasonable man could reasonably be convinced of guilt beyond a reasonable doubt. U.S. v. Wilson, 342 F.2d 43, 44 (2d Cir. 1965); U.S. v. Desisto, 329 F. 2d 929, 932 (2d Cir.), cert. denied, 377 U.S. 979 (1964).

V

THE DEFENDANT'S RIGHT TO A FAIR TRIAL WAS DEPRIVED IN THIS CASE, BY THE USE OF ILLEGAL TESTIMONY OBTAINED BY WRONGFUL ABUSE OF THE GRAND JURY PROCESS AFTER INDICTMENT, WHICH REQUIRES REVERSAL -- AND ALSO REQUIRES A RULE THAT A PROSECUTOR MUST OBTAIN PERMISSION OF THE COURT TO USE THE GRAND JURY PROCESS FOR ANY PURPOSE AFTER INDICTMENT.

There is one significant exception to the Defendants previously mentioned "satisfaction" with the "state of the evidence".

That exception involves the testimony of Alan Boers, the CPA from Ernst & Ernst who prepared the U.S. Partnership Returns for 1966 and 1967, and who also prepared the letter of instructions that accompanied the returns.

It also involves his being subpoenaed only one week before the trial to appear before a Grand Jury and be questioned by the U.S. Attorney regarding matters about which he was going to testify at the trial.

The day before the trial, the U.S. Attorney subpoenaed 2 more witnesses who had already been subpoenaed to testify at the trial. (N. Courtessis and M. Foody).

Defense counsel became aware of this because when the subpoena was served on Mr. Courtessis, he was working on the case with Defense Counsel

in his office.

Defense counsel made a motion to quash the subpoenas on the day before the trial on the ground that it was a gross abuse of the function of the Grand Jury.

That this was in fact the case was made abundantly and painfully clear by Mr. Welch in his responses to sharp questioning by the Court (Tr 14-18, proceedings of 6/5/74).

The result of the motion to quash was that the U.S. Attorney withdrew his subpoenas, and the Court did not rule on the motion.

The Court, during the argument of motion, did point out very strongly the impropriety of using a Grand Jury for purposes other than obtaining an indictment -- especially for the limited purposes set forth by the U.S. Attorney.

Despite all this, when Mr. Boers testified two days later, the U.S. Attorney dramatically confronted him with the minutes of his sworn testimony before the Grand Jury the previous week.

As the transcript shows, Mr. Boers tried to explain there was not really any inconsistency in his testimony, but the damage had already been done.

The testimony concerned the most material and the most relevant aspect of the relationship between the Defendant and Mr. Boers -- it related to the question of whether Mr. Boers had advised Mr. Fahey in any way to consider his payments as taxable income.

He had not, and he insisted he had not, but the U.S. Attorney had already exploited the situation to throw a doubt in the Jury's mind. (Tr 90)

That this in fact happened was indisputably demonstrated when the jury, during their deliberation, requested a transcript of the testimony of Mr. Boers and Mr. Fahey (Tr 256). It was not available, and the jury resolved their question.

We submit that use of the Grand Jury by the U.S. Attorney on the eve of trial to try to trap Mr. Boers, a prospective trial witness with a damaging performance as a witness at the trial is clear, reversible error, which deprived Mr. Fahey of the right to a fair trial.

The rationale behind these moves by the U.S. Attorney is so clearly documented on the record that we submit it is a timely opportunity for the court to remedy the continuing potential dangers of this practice with a simple rule.

The rule we seek is that a prospecutor must always obtain permission of the court to use the Grand Jury process for any purpose after indictment.

VI

THE PROSECUTOR, IN THE MANAGEMENT OF THE CASE VIS-A-VIS THE DEFENDANT, UNDERTOOK ACTIONS THAT WERE NOT PROPERLY PROFESSIONAL TO THE EXTENT THAT HE ADVERSELY INFLUENCED THE RIGHT OF THE DEFENDANT TO A FAIR TRIAL.

The following are examples of the types of actions we considered improper.

(1) Abuse of the Grand Jury Process (see prior discussion)

(2) Withholding evidence previously committed in a voluntary full-exchange-of-evidence agreement. (See proceedings of 6/5/74')

(3) Tailored defenses. (Boers vis-a-vis his own letters of instruction.)

(4) Reneging openly on an agreement to turn over a specific document (Tr 11, Proceedings, 6/5/74).

(5) Giving an erroneous impression to the Defense Counsel that he was fairly interested in getting the Defendant a fair opportunity to justify a dismissal of the indictment. (Refusal to send Defense exculpatory evidence to Washington, 5/31/74).

(6) Improper remarks about the Defendant in summation.

CONCLUSION

There were prejudicial errors in the proceedings below. The trial was unfair and the evidence of guilt was insufficient as a matter of law. The judgement of conviction should be reversed.

Respectfully submitted,

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C 375—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 74-8285

UNITED STATES OF AMERICA,

APPELLEE
~~Plaintiff~~

against

THOMAS M. FAHEY,

APPELLANT
~~Defendant~~

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF ONONDAGA ss.:

NICHOLAS A COURTESSIS being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 214 SCOTTHOLM BLVD., SYRACUSE, NY 13224

That on the 1ST day of OCTOBER 1974 at 5:00 P.M.

deponent served the annexed DUPLICATE COPIES OF APPELLANT'S BRIEFS upon U.S. ATTORNEY, NORTHERN DISTRICT OF NEW YORK

the APPELLEE in this action by delivering a true copy thereof to said individual'S ~~personally~~ OFFICE SECRETARY Deponent knew the person so served to be the person mentioned and described in said papers as the OFFICE SECRETARY OF THE U.S. ATTORNEY herein.

Sworn to before me, this 1ST
day of OCTOBER 1974

Dante M. Scaccia
DANTE M. SCACCIA
NOTARY PUBLIC, STATE OF NEW YORK

Nicholas A. Courtessis
Print name beneath signature
NICHOLAS A. COURTESSIS